IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

JUDGMENT

Ram Prasad Vs. State of Rajasthan

S.B.CRIMINAL APPEAL NO.136/2003
Against the judgment and order dt. 30.11.2002 passed by Special Judge, NDPS Act Cases, Pratapgarh in Special Sessions Case No.42/2000.

Date of Judgment : July 03, 2006

PRESENT

HON'BLE MR.JUSTICE H.R.PANWAR

Mr.Vineet Jain for Mr. Sandeep Mehta for appellant.
Mr. J.P.S.Choudhary, Public Prosecutor for the State.

BY THE COURT:

This criminal appeal under section 374(2) of the Code of Criminal Procedure, 1973 (for short `the Code' hereinafter) is directed against the judgment and order dt. 30.11.2002 passed by the Special Judge, N.D.P.S. Act Cases, Pratapgarh (for short `the trial court' hereinafter) in Special Sessions Case No.42/2000, whereby the trial court convicted the appellant for the offence under section 8 read with section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short `the NDPS Act' hereinafter) and sentenced him to undergo 10 years' rigorous imprisonment and a fine of Rs.1,00,000/-, in default of payment of fine, further to undergo one year's rigorous

imprisonment. Aggrieved by the judgment and order impugned convicting and sentencing the appellant, the appellant has filed the instant appeal.

I have heard learned counsel for the appellant and the Public Prosecutor for the State. Carefully gone through the judgment and order impugned as also record of the trial court. I have scrutinized, scanned and evaluated the evidence on record.

It is contended by learned counsel for the appellant that the prosecution has failed to establish the exclusive conscious possession of the contraband opium by the appellant. It is further contended that the provisions of section 42 of the NDPS Act have not been complied with and lastly it is contended that the matter was investigated by the SHO, who himself lodged the report and, therefore, according to the counsel for the appellant, the trial is vitiated on these points.

Learned Public Prosecutor appearing for the State, controverting the contentions raised by the counsel for the appellant, submits that the information was written down in Roznamcha vide Ex.P/22, copy of which is Ex.P/22-A and was sent to higher officer i.e. Deputy Superintendent of Police vide Ex.P/23, copy of which is Ex.P/23-A, which has been established from despatch register Ex.P/23 and, therefore, according to learned Public Prosecutor, the provisions of

section 42 of the NDPS Act have fully been complied with. So far as exclusive conscious possession of the contraband opium by the appellant is concerned, it was the appellant, who furnished the information under section 27 of the Indian Evidence Act, 1872 (for short `the Evidence Act' hereinafter) vide Ex.P/9 in a case for the offences under sections 457 and 380 I.P.C. while he was under arrest in that case. The information was voluntarily furnished by the appellant. In pursuance of the information Ex.P/9 voluntarily furnished by the appellant under section 27 of the Evidence Act, a huge quantity of opium weighing 17.100 kgs. was recovered on 14.6.2000 from a house which was possessed by the appellant and the appellant failed to explain the possession and, therefore, in view of the provisions of sections 35 and 54 of the NDPS Act, a presumption can be drawn against the appellant's possessing the contraband opium weighing 17.100 kgs. without there being any valid permit or licence. So far as investigation by the SHO PW.11 Bhan Singh is concerned, the controversy is no more res integra in view of the decisions of Hon'ble Supreme Court in S.Jeevanantham vs. State through Inspector of Police, T.N. **(2004) 5 SCC 230** and State represented by Inspector of Police, Vigilance & Anti-Corruption, Tiruchirapalli, T.N. vs. V. Jayapaul **(2004) 5 SCC 223.**

I have given my thoughtful consideration to the rival contentions raised by the learned counsel for the parties.

PW.11 Bhan Singh was the Station House Officer, Police Station, Dhamotar on the relevant date i.e. 14.6.2000. In crime case No.26/2000 for the offences under sections 457 and 380 I.P.C., the appellant was arrested and during investigation in the crime report while in custody, he voluntarily furnished the information under section 27 of the Evidence Act that he along with his associates stole some containers having opium from the Government Godown of Opium Weighing Centre, Dhamotar two months ago, which was divided between them; the opium of his share, had been concealed by him by digging a pit in left corner of his house and he is prepared to get the same recovered vide Ex.P/9. He took the appellant along with information furnished by him to PW.4 Tulsi Ram, S.H.O., Police Station, Rathanjana. On the written report by PW.11 Bhan Singh Ex.P/8, PW.4 Tulsi Ram, S.H.O., Rathanjana registered a crime report. He also wrote down it separately in Roznamcha vide Ex.P/22. The information which was received by him was sent to higher officer i.e. Deputy Superintendent of Police vide Ex.P/23, copy of which is Ex.P/23-A. A copy was also sent to the Superintendent of Police and Additional S.P. in compliance of sub-section (2) of section 42 of the NDPS Act. He has proved Exhibits-P/22, P/22-A, P/23 and Ex.P/23A as also the despatch register by which the information which he received and wrote down in Roznamcha Ex.P/22 was sent. The information was also sent to the Superintendent of Police and Additional S.P. Vide

Ex.P/24. He further stated that on the basis of information furnished by the appellant, PW.4 Tulsi Ram, carried out the search and seizure of the opium weighing 17.100 kgs. A crime report No.97/2000 under section 8/18 of the NDPS Act was registered at Police Station, Rathanjana. As directed by the higher officer, he was entrusted with the investigation of the case. He recorded the statements of the witnesses, prepared site map Ex.P/7, sent the sample to FSL after getting the forwarding letter prepared vide Ex.P/15, sample deposit Ex.P/16, forwarding letter Ex.P/17. He has proved the Roznamcha, copy of Roznamcha Ex.P/18 to Ex.P/22-A, copy of despatch register Ex.23-A and 24-A. He has also proved Ex.P/25, by which verification of the house of the appellant was sought from Sarpanch, Gram Panchayat, Pillu, Ex.P/26 verification certificate issued by PW.5 Rameshwar, Sarpanch, Gram Panchayat, Pillu, arrest memo Ex.P/29, FIR Ex.P/30, site map of Godown of Narcotic Department, Opium Weighing Centre, Dhamotar Ex.P/31 and Ex.P/32 by which the sample marked "A" was chemically examined.

PW.4 Tulsi Ram, Station House Officer, Police Station, Dhamotar has stated that on 14.6.2000, PW.11 Bhan Singh handed over the accused appellant in custody along with information furnished by him under section 27 of the Evidence Act on the basis of which a crime report Ex.P/8 was registered. The information was found to be reliable and was written down and in compliance of sub-section (2) of section

42 of the NDPS Act, the same was sent to Deputy Superintendent of Police, Pratapgarh through PW.13 Constable Prahlad vide Ex.P/10, which was received by the Circle Officer Sawai Singh on 14.6.2000 itself. Thereafter, he along with the appellant and other police officials PW.9 Narendra Singh, Shanker Singh, Hari Singh etc. went to Magroda, therefrom, they took two Motbirs viz. PW.1 Gopal Dass and PW.2 Govind Singh, who were apprised of the secret information by a notice to become Motbirs. They gave their consent to become Motbirs vide Ex.P/1 and Ex.P/5 respectively. The appellant opened the lock of the house by a key which was kept under the stones (Khande), entered the house, delved a pit of left corner of the house and took a white polythene bag containing opium. The appellant stated that it is that opium, which he along with his associates had stolen from the Government Godown of Opium Weighing Centre, Dhamotar two months ago. On being weighed the opium, it was found 17.100 kgs.; two samples of 30 grams each were taken from there. The samples and remaining opium were sealed on the spot, memo of specimen seal was prepared vide Ex.P/3, the samples marked 'A' and 'A-2' and the remaining contraband opium marked 'A' were seized vide seizure memo Ex.P/2. After recovery, “Parcha Kayami Crime” Ex.P/11 was prepared. Thereafter, the accused was handed over to PW.9 Narendra Singh and Shanker Singh, constables, Police Station, Dhamotar; the contraband opium and the samples taken therefrom were sealed on the spot and deposited with PW.12 Bhanwar Singh, Malkhana Incharge

vide Ex.P/13. A detailed report regarding search and seizure and arrest of the appellant as envisaged under section 57 of the NDPS Act was sent to the Superintendent of Police, Chittorgarh vide Ex.P/14. The sample marked 'A' was sent to the FSL along with forwarding letter obtained from SP Office vide Ex.P/15 through PW.7 Narayan, who deposited the sample with the FSL vide Ex.P/16. He has proved the forwarding letter Ex.P/17. He has also proved information under sub-section (2) of section 42 of the Act on the basis of information furnished by the appellant under section 27 of the Evidence Act in Roznamcha Aam Rapat No.391 Ex.P/18. He has proved return report of PW.11 Bhan Singh vide Ex.P/19. He has also proved Ex.P/20, P/21, P/22, P/22-A etc.

PW.5 Rameshwar was the Sarpanch, Gram Panchayat, Pillu at the relevant time, in whose area, the appellant's house is situate. PW.7 Narayan, Constable, P.S.Rathanjana has stated that he took the sample along with some papers on 19.6.2000 from PW.12 Bhanwar Singh Malkhana Incharge to be deposited with FSL, Jaipur. He went to SP Office, Chittorgarh got the forwarding letter prepared and in the very evening, went to Jaipur and deposited the samples along with papers to the FSL Jaipur on 20.6.2000. The samples and papers, which he carried to the FSL, till all the time they remained with him, were properly sealed and seals thereon remained intact. He has proved the letter Ex.P/15, receipt Ex.P/16, forwarding letter of SP

Office Ex.P/17, Roznamcha Ex.P/27 and his return report at Police Station Ex.P/28.

PW.9 Narendra Singh is the witness to the recovery. He made a statement similar to that of PW.4 Tulsi Ram, the search and seizure officer. PW.12 Bhanwar Singh is the Malkhana Incharge. He has stated that on 14.6.2000, PW.4 Tulsi Ram deposited the contraband opium and samples with him, which were registered at Malkhana Register at serial No.28; contraband opium and samples were properly sealed. He has proved the serial No.28 of the Malkhana Register vide Ex.P/33-A. He has stated that on 19.6.2000, the sample marked 'A' was given to PW.7 Narayan, who took the same to the SP Office, got the forwarding letter prepared and onwards to FSL and deposited the same to the FSL on 20.6.2000 and brought the receipt on 22.6.2000.

PW.13 Prahlad is the person, who carried the information to Deputy Superintendent of Police, Pratapgarh, Additional Superintendent of Police, Pratapgarh and Superintendent of Police, Chittorgarh on 14.6.2000 and handed over the same vide Ex.P/10. Though Motbirs PW.1 Gopal Das and PW.2 Govind Singh did not support the prosecution case, but they admitted their signatures on various “Furds”.

On close scrutiny of the statements of the prosecution witnesses discussed herein above, it has been established beyond reasonable doubt that the appellant, while in custody in a crime case No.26/2000 for the offences under sections 457 and 380 I.P.C., voluntarily furnished the information under section 27 of the Evidence Act disclosing the fact that he stole 17.100 kgs. of opium from Government Godown of Opium Weighing Centre, Dhamotar and concealed the same in his house, which he is prepared to get recovered. With the said information, PW.11 Bhan Singh took the appellant to Police Station, Rathanjana of which PW.4 Tulsi Ram, at the relevant time, was Station House Officer. On the basis of report Ex.P/8, a crime report was registered for the offence under section 8/18 of the NDPS Act. From the house of the appellant, which has been verified by PW.5 Rameshwar, Sarpanch, Gram Panchayat, Pillu, a recovery of 17.100 kgs. of opium was effected. It was the appellant, who opened the lock of a room of his house by a key and thereafter he entered the room, delved a pit in left corner of the room and took out the concealed opium. On chemical examination, the samples contained in the packet marked 'A-1' gave positive test for the presence of chief constituents of coagulated juice of opium poppy having 7.89 percent. morphine vide Ex.P/32. It has also been established from the FSL Report Ex.P/32 that the sample packet marked 'A-1' enclosed within cloth cover which was properly sealed bearing impressions which tallied with specimen seal impression

forwarded and the seals thereon were intact.

In Madan Lal and Anr. vs. State of H.P., **(2003) 7 SCC 465**, while considering the expressions "possession" and "conscious", the Hon'ble Supreme Court has held that the word "possession" means the legal right to possession. The expression "possession is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. Possession in a given case need not be physical possession but can be constructive, having power and control over the article in the case in question, while the person to whom physical possession is given holds it subject to that power or control. While considering the expression "conscious", the Hon'ble Supreme Court has held that the word "conscious" means awareness about a particular fact. It is a state of mind which is deliberate or intended. In that case, the accused-persons were travelling in a vehicle and were known to each other and it had not been explained or shown as to how they travelled together from the same destination in a vehicle which was not a public vehicle carrying contraband "Charas". Their Lordships held that once the possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the

position in terms of section 54 where also presumption is available to be drawn from possession of illicit articles.

From the evidence discussed hereinabove, it has been established beyond reasonable doubt that it was the appellant, who had exclusive conscious possession of the contraband opium weighing 17.100 kgs., which is commercial quantity without there being permit or licence.

So far as contention of the learned counsel for the appellant that the complainant himself investigated the matter is concerned, firstly search and seizure were made by PW.4, report was lodged vide Ex.P/8 and after the report Ex.P/8, subsequent events i.e. search and seizure were made by PW.4 Tulsi Ram, S.H.O., Police Station, Rathanjana and thereafter on the direction of the higher officer to further conduct the investigation, he did so.

In State represented by Inspector of Police, Vigilance & Anti-Corruption, Tiruchirapalli, T.N. vs. V.Jayapaul (supra), the Hon'ble Supreme Court has held as under:

> "There is nothing in the provisions of the Criminal Procedure Code which precluded the appellant from taking up the investigation. The fact that the said police officer prepared the

> FIR on the basis of the information received by him and registered the suspected crime does not disqualify him from taking up the investigation of the cognisable offence. A suo motu move on the part of the police officer to investigate a cognisable offence impelled by the information received from some sources is not outside the purview of the provisions contained in Sections 154 to 157 of the Code or any other provisions of the Code."

The Hon'ble Supreme further held as under:

> "There is no principle or binding authority to hold that the moment the competent police officer, on the basis of information received, makes out an FIR incorporating his name as the informant, he forfeits his right to investigate. If at all, such investigation could only be assailed on the ground of bias or real likelihood of bias on the part of the investigating officer. The question of bias would depend on the facts and circumstances of each case and it is not proper to lay down a broad and unqualified proposition, in the manner in which it has been done by the High Court, that whenever a police officer proceeds to investigate after registering the FIR on his own, the investigation would necessarily be unfair or biased."

In S.Jeevanantham vs. State through Inspector of Police, T.N. (supra), the Hon'ble Supreme Court has held as under:

> "In the instant case, PW.8 conducted the search and recovered the contraband article and registered the case. Thereafter as part of his official duty he investigated the case and filed a charge-sheet. He was not in any way personally interested in the case. There is no bias in the process of investigation. The appellants also could not point out any circumstances by which the investigation caused prejudice or was biased against them. The appellants were thus rightly convicted and sentenced by the courts below."

In view of the aforesaid decisions of the Hon'ble Supreme Court, the contention raised by the counsel for the appellant that the trial vitiates is not acceptable and the same is liable to be rejected.

So far as the independent panch witness i.e. PW.5 Rameshwar, Sarpanch, Gram Panchayat, Pillu not supporting the prosecution case is concerned, the Hon'ble Supreme Court in P.P.Fathima vs. State of Kerala, **JT 2003(8) SC 527** has held that it has been repeatedly held that the mere fact that a Panch witness does not support the prosecution case by itself would not make the prosecution case any less acceptable if otherwise the Court is satisfied from the material on record and from the evidence of the seizing authority that such seizure was genuinely made. In this view of the matter, the contention

regarding the Panch witness not supporting the prosecution case also deserves to be rejected.

So far as contention regarding violation of sub-section (2) of section 42 of the NDPS Act is concerned, from the statements of PW.4 Tulsi Ram, PW.11 Bhan Singh, PW.9 Narendra as also from Ex.P/10 and Ex.P/22, it has been proved beyond reasonable doubt that section 42 of the NDPS Act has been fully complied with.

In view of the aforesaid discussion, I do not find any error in the judgment and order impugned convicting and sentencing the appellant for the offence under section 8/18 of the NDPS Act.

In the result, the appeal fails and is hereby dismissed. Judgment and order dt. 30.11.2002 passed by Special Judge, NDPS Act Cases, Pratapgarh in special sessions case No.42/2000 convicting and sentencing the appellant for the offence under section 8/18 of the NDPS Act is hereby affirmed.

[H.R.PANWAR],J.

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